

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs October 14, 2005

**PHILLIP DORROUGH v. TENNESSEE BOARD OF PROBATION &  
PAROLE**

**Appeal from the Chancery Court for Davidson County**  
**No. 03-2770-III Ellen Hobbs Lyle, Chancellor**

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**No. M2004-01696-COA-R3-CV - Filed February 27, 2006**

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This appeal involves a prisoner's challenge to a decision of the Tennessee Board of Probation and Parole and the application of a 1997 amendment to Tenn. Code Ann. § 40-28-105, which was subsequent to his conviction, that requires four votes in favor of parole for prisoners convicted of certain crimes to be paroled. The statute previously required only three favorable votes in order to be paroled. The prisoner contends the part of the amendment that specifies it applies to persons "who may now be serving a sentence in a state or county correctional facility" violates statutory law as well as the ex post facto clauses of the United States Constitution and the Tennessee Constitution. The Chancery Court dismissed the complaint. We affirm.

**Tenn. R. App. P. 3; Judgment of the Chancery Court Affirmed**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

Patrick T. McNally, Nashville, Tennessee, for the appellant, Phillip Dorrough.

Paul G. Summers, Attorney General and Reporter; Michael Moore, Solicitor General; and Pamela S. Lorch, Senior Counsel, Attorney General's Office, for the appellee, Tennessee Board of Probation and Parole.

## MEMORANDUM OPINION<sup>1</sup>

The prisoner filed a verified complaint for a writ of certiorari in the Chancery Court for Davidson County asserting that the Board violated the constitutional prohibition against ex post facto laws by following a different procedure to reach its decision than was in effect at the time of his crime. The Chancery Court dismissed the complaint based upon this court's decision in *Miller v. Tennessee Bd. of Probation and Paroles*, 119 S.W.3d 696 (Tenn. Ct. App. 2003). We affirm the dismissal of the petition.

Phillip Dorrough was convicted of first degree murder and four counts of armed robbery in 1980 and sentenced to five life sentences to run concurrently. At the time of his conviction, Tenn. Code Ann. § 40-28-105 required that prisoners receive three favorable votes in order to be paroled.<sup>2</sup> In 1997, the General Assembly amended Tenn. Code Ann. § 40-28-105 to require four votes in favor of parole for prisoners convicted of certain specific offenses including murder. [Acts 1997, ch. 488 § 1]. The provisions of Tenn. Code Ann. § 40-28-105 apply to persons sentenced after the enactment as well as to "those who may now be serving a sentence in a state or county correctional facility." Tenn. Code Ann. § 40-28-113.

Mr. Dorrough appeared before the Board on March 12, 2003. Three members voted in favor of parole. However, the board applied the four vote requirement based on the 1997 amendment to Tenn. Code Ann. § 40-28-105 and thus denied Mr. Dorrough parole. Mr. Dorrough timely filed an administrative appeal which the Board denied on July 21, 2003. Mr. Dorrough filed this verified complaint for a writ of certiorari in the Chancery Court on September 18, 2003.

On November 14, 2003, the Board moved to dismiss the complaint based on this court's decision in *Miller*. Mr. Dorrough responded by admitting that the Chancery Court should dismiss the complaint based upon *stare decisis*. Mr. Dorrough subsequently perfected an appeal to this court.

Mr. Dorrough asserts that Tenn. Code Ann. § 40-28-105 required only three votes in favor of parole when he was convicted and that applying the subsequently enacted four vote statute to him violates statutory law as well as the ex post facto clauses of both the United States Constitution and

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<sup>1</sup>Tenn. Ct.App. R. 10 provides:

The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion, it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

<sup>2</sup> In 1980, the statute provided for a five member Board which could grant parole only by a majority vote of the entire Board. [Acts 1979, ch. 359 §§ 5, 26]. In 1988, the General Assembly amended the statute to provide that "no person shall be paroled ... without the concurrence of three (3) board members." [Acts 1988, ch. 880 § 3]. The Board's membership was increased to seven in 1989. [Acts 1989, ch. 506 §§ 1-2].

the Tennessee Constitution. Mr. Dorrough concedes, however, that this court has already ruled on the merits of his contention in *Miller* and he renews the issue here so that he can join other individuals who are seeking federal review of the issue.

This court acknowledged in *Miller* that eligibility for parole consideration is normally part of the law annexed to the crime when committed, and that a change of parole eligibility standards may implicate ex post facto concerns. However, the court went on to hold:

[P]arole itself stands on a different footing than parole eligibility. There is no constitutional (or statutory) right to be paroled from a validly imposed sentence of imprisonment. *Wells v. Tennessee Bd. of Paroles*, 909 S.W.2d 826 (Tenn.Ct.App.1995); *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). Further, the grant of parole in Tennessee is a discretionary matter, vested exclusively in the Board of Paroles. *Doyle v. Hampton*, 207 Tenn. 399, 340 S.W.2d 891 (1960). Though the Board is charged with following the procedures set out by statute for determining parole questions, we do not believe that those specific procedures should themselves be considered a part of the law annexed to a prison sentence at the time of sentencing. *Miller v. Tennessee Bd. of Probation and Paroles*, 119 S.W.3d 696, 701 (Tenn. Ct. App. 2003).

We decline to reconsider our holding in *Miller*. The General Assembly may change the specific procedures to be used by the Board, including the number of votes required for parole, without violating the ex post facto clause of either the United States Constitution or the Tennessee Constitution.

We affirm the judgment of the trial court and remand with costs of the appeal to Phillip Dorrough and his surety for which execution, if necessary, may issue.

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FRANK G. CLEMENT, JR., JUDGE